

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-644

NORTH CAROLINA COURT OF APPEALS

Filed: 4 January 2011

STATE OF NORTH CAROLINA

v.

Lenoir County
Nos. 08 CRS 2682
08 CRS 50828
08 CRS 52049
09 CRS 1480

CLIFTON DERON EDWARDS

Appeal by defendant from judgment entered 2 November 2009 by Judge Kenneth F. Crow in Lenoir County Superior Court. Heard in the Court of Appeals 20 December 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Juanita B. Twyford, for the State.

Duncan B. McCormick, for defendant-appellant.

JACKSON, Judge.

Clifton Deron Edwards ("defendant") appeals from a judgment entered upon his guilty plea to charges of possession with intent to sell or deliver cocaine, felony possession of cocaine, and being an habitual felon. Because an error was made in calculating defendant's prior record level, we remand for resentencing.

On 2 November 2009, defendant pled guilty pursuant to a plea agreement to possession with intent to sell or deliver cocaine, felony possession of cocaine, and being an habitual felon. Sentencing was left to the discretion of the trial court. At

sentencing, both defendant and his counsel reviewed the sentencing worksheet prepared by the State, which calculated defendant's prior record level. However, only defendant signed the sheet. The worksheet contained, among other convictions, one for possession of stolen goods from 30 April 1992 and another for breaking or entering from 30 April 1992. Both convictions occurred in Lenoir County, and each of these convictions counted as one point toward defendant's prior record level. The worksheet calculated defendant's prior record level points as nine and assigned his prior record level as IV. Defendant stipulated that he had nine prior record level points, making him a Level IV felon.

The trial court consolidated the charges and sentenced defendant as a Class C, Level IV felon to a term of 120 to 153 months imprisonment. Defendant appeals.

Defendant first argues that the trial court erred by including more than one conviction from a single session of court in calculating his prior record level, which violated North Carolina General Statutes, section 15A-1340.14(d). The State concedes this argument, and we agree.

A trial court's assignment of a prior record level to a defendant constitutes a conclusion of law, which we review *de novo*. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007) (citing *Carringer v. Alverson*, 254 N.C. 204, 208, 118 S.E.2d 408, 411 (1961)).

North Carolina General Statutes, section 15A-1340.14(d) provides that, "[f]or purposes of determining the prior record

level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used." N.C. Gen. Stat. § 15A-1340.14(d) (2007). Pursuant to the statute applicable to defendant's case, if a defendant has "[a]t least 5, but not more than 8 points[,] " he is a prior record level III. N.C. Gen. Stat. § 15A-1340.14(c) (2007). If he has "[a]t least 9, but not more than 14 points[,] " he is a prior record level IV. *Id.*

Here, according to the prior record level worksheet, two of defendant's misdemeanor convictions came on the same day in Lenoir County. Clearly, only one of defendant's convictions from 30 April 1992 should have counted toward his prior record level. When the superfluous point is deducted from defendant's total, he becomes a prior record level III offender, rather than a Level IV. Accordingly, the trial court erred in sentencing defendant as a Level IV offender, and this matter is remanded to the trial court for resentencing.

We also note that defendant stipulated to his prior record level. However, this Court has held that a stipulation as to the accuracy of a prior conviction worksheet "does not preclude our *de novo* appellate review of the trial court's calculation of defendant's prior record level," even though "it is sufficient to satisfy the State's evidentiary burden of proof of this conviction." *State v. Massey*, 195 N.C. App. 423, 429, 672 S.E.2d 696, 699 (2009). See also N.C. Gen. Stat. § 15A-1340.14(f)(1) (2007). In addition, we previously have held that a trial court's

assignment of an improper prior record level to a defendant is reviewable as a conclusion of law, notwithstanding that defendant's stipulation to such a prior record level. See *Fraley*, 182 N.C. App. at 691, 643 S.E.2d at 44.

As in the case *sub judice*, the defendant in *Fraley* stipulated to his prior record level. Nevertheless, this Court reviewed the defendant's prior record level and remanded the matter for resentencing, because the trial court erroneously had included two convictions from the same day of court when calculating defendant's prior record points. *Id.* *Fraley* is indistinguishable from the instant case. Accordingly, we remand the case for resentencing so that defendant's prior record level may be calculated properly.

Defendant next argues that the habitual felon statute, as applied to him, constitutes cruel and unusual punishment. However, because the matter is being remanded for resentencing, we do not address this issue at this time.

Remanded.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).

Judge JACKSON concurred prior to December 31, 2010.